

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1969-2341-2366

To be argued by
PETER K. LEISURE

United States Court of Appeals
FOR THE SECOND CIRCUIT

IIT, an International Investment Trust, and GEORGES BADEN,
JACQUES DELVAUX and ERNEST LECUIT, as Liquidators for IIT, an International Investment Trust,

Plaintiffs-Appellees-Cross-Appellants,

—against—

VENCAP, LTD., INTERVENT, INC., INTERCAPITAL, N.V.,
RICHARD C. PISTELL, CHARLES E. MURPHY, JR.,
DAVID TAYLOR and HAVENS, WANDLESS, STITT &
TIGHE,

Defendants-Appellants-Cross-Appellees,

and

WALTER BLACKMAN,

and

ROBERT L. VESCO, MILTON F. MEISSNER,
NORMAN LeBLANC and STANLEY GRAZE,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF
DEFENDANTS-APPELLANTS-CROSS-APPELLEES
CHARLES E. MURPHY, JR., DAVID TAYLOR
and HAVENS, WANDLESS, STITT & TIGHE

CURTIS, MALLET-PREVOST, COLT & MOSLE
Attorneys for Defendants-Appellants-

Cross-Appellees

Charles E. Murphy, Jr.,

David Taylor and

Havens, Wandless, Stitt & Tighe

100 Wall Street

New York, New York 10005

Of Counsel:

PETER K. LEISURE

JOHN E. SPRIZZO

ROBERT S. LIPTON

JOHN F. EGAN

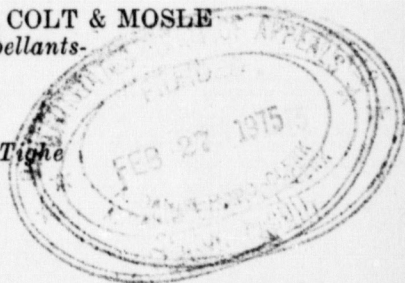




TABLE OF CONTENTS

	PAGE
Preliminary Statement	2
Plaintiffs' View of the Facts	2
POINT I—	
The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Federal Securities Law Claims	10
POINT II—	
The Non-Securities Law Bases Upon Which Plain- tiffs Assert Subject Matter Jurisdiction Are Also Insufficient to Confer Jurisdiction Over This Ac- tion	18
CONCLUSION	21

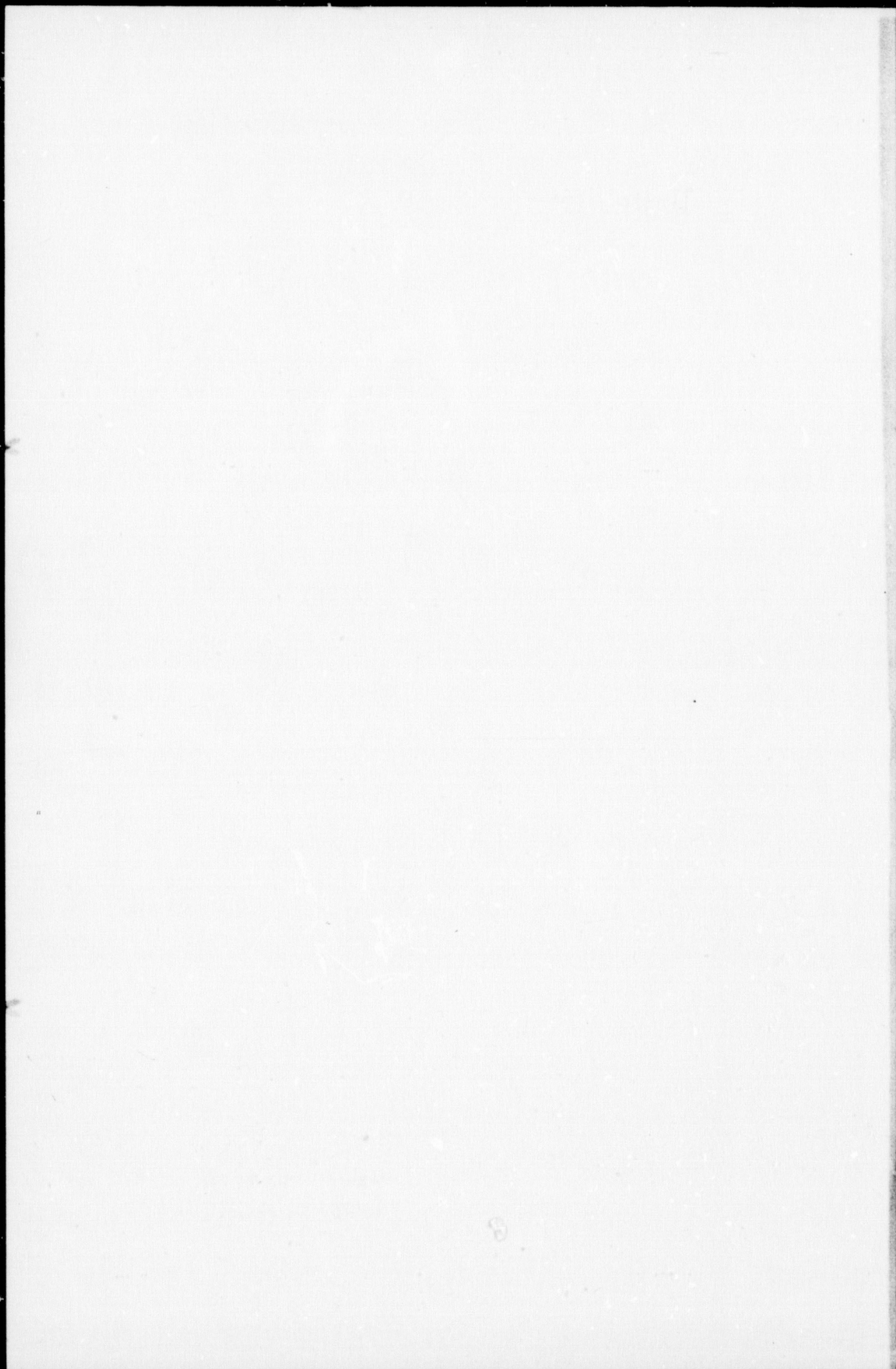
TABLE OF AUTHORITIES

Cases:

<i>Abiodun v. Martin Oil Service, Inc.</i> , 475 F.2d 142 (7th Cir.), <i>cert. denied</i> , 414 U.S. 866 (1973)	20
<i>City of Chicago v. Atchison, T. & S.F.Ry.</i> , 357 U.S. 77 (1958)	2n
<i>Fishgold v. Sullivan Drydock & Repair Corp.</i> , 328 U.S. 275 (1946)	2n
<i>Investment Properties International, Ltd. v. I.O.S., Ltd.</i> , [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,011 (S.D.N.Y.), <i>aff'd without opinion</i> , (un- reported 2d Cir. 1971)	13, 14

<i>Leasco Data Processing Equipment Corp. v. Maxwell</i> , 468 F.2d 1326 (2d Cir. 1972)	10, 11, 12, 13, 14
<i>Lopes v. Reederei Richard Schroder</i> , 225 F. Supp. 292 (E.D. Pa. 1963)	19
<i>Norman's on the Waterfront, Inc. v. Wheatley</i> , 444 F.2d 1011 (3rd Cir. 1971)	2n
<i>Schoenbaum v. Firstbrook</i> , 405 F.2d 200 (2d Cir.), <i>rev'd</i> <i>in part on other grounds</i> , 405 F.2d 215 (2d Cir. 1968) (en banc), <i>cert. denied sub nom. Manley v. Schoen-</i> <i>baum</i> , 395 U.S. 906 (1969)	10, 11, 12, 13, 14, 16
<i>United States Fidelity & Guaranty Co. v. Bray</i> , 225 U.S. 205 (1912)	2n
<i>Valanga v. Metropolitan Life Insurance Co.</i> , 259 F. Supp. 324 (E.D. Pa. 1966)	19
<i>Statutes and Rules:</i>	
Securities Exchange Act 1934—	
Section 12, 15 U.S.C. §78l	16, 16n, 17
Section 14, 15 U.S.C. §78n	16, 16n, 17
Section 16, 15 U.S.C. §78p	16, 16n, 17
SEC Rule 3a12-3(b), 17 C.F.R. §240.3a12-3(b)	16n
SEC Rule 12g3-2(e), 17 C.F.R. §240.12g3-2(e)	16n
Title 28, U.S.C.—	
Section 1292(a)	2n
Section 1332	18n

	PAGE
Section 1337	18n
Section 1350	18, 19, 20
N. Y. Civil Practice Law and Rules—	
Section 302	18



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1969, 74-2341, 74-2366

IIT, an International Investment Trust, and GEORGES
BADEN, JACQUES DELVAUX and ERNEST LECUIT, as Liqui-
dators for IIT, an International Investment Trust,

Plaintiffs-Appellees-Cross-Appellants,

—against—

VENCAP, LTD., INTERVENT, INC., INTERCAPITAL, N.V., RICHARD
C. PISTELL, CHARLES E. MURPHY, JR., DAVID TAYLOR and
HAVENS, WANDLESS, STITT & TIGHE,

Defendants-Appellants-Cross-Appellees,

and

WALTER BLACKMAN,

and

ROBERT L. VESCO, MILTON F. MEISSNER,
NORMAN LEBLANC and STANLEY GRAZE,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF OF
DEFENDANTS-APPELLANTS-CROSS-APPELLEES
CHARLES E. MURPHY, JR., DAVID TAYLOR
and HAVENS, WANDLESS, STITT & TIGHE**

Preliminary Statement

Defendants-appellants-cross-appellees Charles E. Murphy, Jr. ("Murphy"), David Taylor ("Taylor") and Havens, Wandless, Stitt & Tighe ("Havens Wandless") submit this brief in reply to the brief on appeal filed by plaintiffs-appellees and in support of their appeal contesting the determination of the United States District Court for the Southern District of New York, per the Honorable Charles E. Stewart, Jr., that it has jurisdiction over the subject matter of this action.*

Plaintiffs' View of the Facts

Plaintiffs' brief not only distorts the truth but also obscures the relevant issues in a mantle of innuendo, thus underscoring the inherent factual weakness in plaintiffs'

* Plaintiffs' inference that defendants Taylor, Murphy and Havens Wandless do not have standing to appeal the issue of subject matter jurisdiction pursuant to Title 28, United States Code, Section 1292(a), because injunctive relief was not entered against them, is wholly without foundation. The law is clear that any *party* to a lawsuit aggrieved by an appealable order may appeal that order, even though it is not directed against him. *City of Chicago v. Atchison, T. & S.F.Ry.*, 357 U.S. 77 (1958); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946); *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3rd Cir. 1971). See also *United States Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205 (1912). There is, of course, no doubt that Taylor, Murphy and Havens Wandless were aggrieved by the district court's determination that it had subject matter jurisdiction over this action, as the *entire* action would have to be dismissed absent such a ruling (see A 896a). Lack of subject matter jurisdiction was fully briefed and argued by counsel for said defendants in the court below (A 892a-94a; Exhibit 44, record on appeal, pp. 7-16, 18-22). However, as plaintiffs agree that this Court should determine the issue of subject matter jurisdiction at this time, and do not contest the right of Taylor, Murphy and Havens Wandless to appeal the district court's order, defendants will not belabor this point.

case. In a blatant effort to draw attention away from the true facts involved herein, plaintiffs have constructed their statement of facts around a detailed description of various irrelevant activities of defendant Robert L. Vesco ("Vesco"), in the apparent hope that the myriad of allegations of impropriety surrounding that now infamous individual will somehow tarnish both this action and the other defendants. Indeed, as the record indicates that Vesco played no part in the facts surrounding IIT's investment in Vencap (A 513a-15a, 672a-74a, 723a-25a, 1458a-60a, 1534a-35a), it can only be assumed that the sole reason for Vesco's inclusion as a defendant herein is to enable plaintiffs to invoke his alleged misdeeds at any point in the proceedings plaintiffs find themselves bereft of an applicable legal or factual argument.

In addition to their misplaced reliance upon the spectre of Vesco, plaintiffs have also sought to connect this action to other actions pending in the district court (IIT Br. Appendix A).^{*} Of course, plaintiffs ignore the fact that the issues involved herein are simply not the issues involved in those other actions and that the jurisdictional foundations of those actions are completely different. In short, this action is not the *Vesco* case and the defendants who have appeared in this action are *not* defendants in *SEC v. Vesco* or in any other "Vesco related" action.^{**}

^{*}References in the form "IIT Br. " are to the brief filed in this appeal by plaintiffs-appellees-cross-appellants. References in the form "Main Br. " are to the main brief on appeal filed by defendants Murphy, Taylor and Havens Wandless.

^{**}All the appearing defendants in this action (Vencap, Ltd., Intervent, Inc., Intercapital, N.V., Richard C. Pistell, Murphy, Taylor and Havens Wandless) have joined in this appeal. Defendant Walter Blackman, who has not appeared, and indeed may never have been served, also is not a defendant in any action involving Vesco. Although plaintiffs imply otherwise (IIT

Despite the extraordinary volume of extraneous material plaintiffs have employed as the matrix of their brief, the issue of jurisdiction over this action, just as all other issues involved herein, must be resolved on the basis of the facts of *this* action, and not upon plaintiffs' rather unsubtle attempt to fill the factual and legal void in their argument through "guilt by association". Clearly, plaintiffs' attempts to equate the presence of Vesco as a defendant with both jurisdiction and liability, as well as their attempts to entangle this action with completely unrelated matters in other actions, are not only in conflict with the rules of both evidence and civil procedure, but are antagonistic to the basic concepts of fair play and justice which have been the touchstone of Anglo-American jurisprudence for centuries.

While plaintiffs' overall strategy is to obscure the truth in a "Vesco Smokescreen", their tactics also include less ambitious distortions of the facts. Although Murphy, Taylor and Havens Wandless have already accurately set forth all of the jurisdictionally relevant facts in their main brief, a review of plaintiffs' factual inaccuracies which touch upon the jurisdictional issue is doubly appropriate at this juncture, as such a review not only reveals the magnitude of plaintiffs' misstatements of fact, but also brings the jurisdictional facts into sharper focus.*

Br. p. 7), none of the appearing defendants has defaulted in answering the complaint. Pursuant to stipulations between counsel the time to answer the complaint has not yet run.

* In an effort to avoid undue burden on the Court, this brief will deal at length only with plaintiffs' most serious mischaracterizations of the record. However, several other factual misstatements are worthy of note and are readily disposed of. Thus, plaintiffs assert that defendants Vencap, Ltd., Intervent, Inc. and Intercapital N.V. have offices at the Havens Wandless office at 99 Park Avenue, New York, New York, although that claim cannot be supported by the record (see Main Br. p. 8). Plain-

As the cornerstone of their factual argument, plaintiffs assert that plaintiff IIT has in excess of 300 fundholders who are American citizens and/or residents. Plaintiffs base this contention on a fundholders' list which the district court admitted in evidence (IIT Br. p. 11). However, plaintiffs neglect to note that while the trial court admitted the fundholders' list for what it was worth, it also ruled that the list failed to prove that IIT had any United States fundholders. Indeed, the district court indicated that if plaintiffs sought to prove that IIT had United States fundholders, they would have to do something beyond submitting the unsworn and unsubstantiated fundholders' list; and this they did not do (A 233a-34a, 925a-27a, 217a-19a, 225a-26a, 207a). Thus, contrary to plaintiffs' assertions, it is clear that the district court did not base its determination that IIT had 300 United States fundholders upon the aforementioned list; and the district court's ruling that such fundholders exist is therefore totally without support in the record and clearly erroneous (see Main Br. pp. 26-28).

Plaintiffs' statement of facts is also faulty with respect to its description of the circumstances surrounding the formation of Vencap (IIT Br. p. 19). Vencap was formed in the Bahamas by Carson, Lawson & Co. ("Carson Law-

tiffs' lengthy lists of citations (IIT Br. p. 13) are principally to those companies' bank statements and confirmations, all dated long after the transaction in question, which were sent to the attention of the Havens Wandless office. Taylor explained that it was not unusual for his law firm to perform such a service for clients, as a matter of convenience (A 603a-05a). Plaintiffs further suggest that Havens Wandless had a history of dealing with defendants Vesco, Meissner, LeBlanc and Graze, from the beginning of 1972, for which they make no reference to the record at all. If anything, the record shows a lack of relationship between Havens Wandless and the aforesaid defendants (A 513a-15a, 543a-44a, 672a-74a, 675a, 679a-80a; Exhibit 12, record on appeal, at pp. 2484-86).

son"), a Bahamian law firm which Murphy contacted, in the Bahamas, at Pistell's request (A 666a-67a, 675a-76a; see Main Br. pp. 12-13). Plaintiffs' brief is strangely silent of any mention of Carson Lawson. Plaintiffs would ignore that Carson Lawson performed the legal work in the formation of Vencap, maintained the Vencap corporate records, and participated in the negotiation and preparation of the IIT/Vencap agreement and in the preparation of the "three-page memorandum" (A 509a, 666a-67a, 675a-76a, 687a-88a, 699a-700a, 809a, 1493a-94a, 1594a, 1703a). In addition, Ernest Raymond Lawson of Carson Lawson was a Vice President, an Assistant Secretary and a director of Vencap; and Jeremy Carson James Waddell of Carson Lawson was an Assistant Secretary and a director of Vencap. Mr. Lawson and Mr. Waddell were active in the meetings of shareholders and/or directors of Vencap (A 509a, 1252a-54a, 1268a-69a, 1274a-75a, 1590a-96a, 1599a-1604a, 1700a-01a).

Plaintiffs attempt to make much of the fact that Taylor's typewritten initials appear on a single page which contains a draft of Vencap's corporate resolution relating to the redemption feature of the preference shares, by claiming that those initials prove that Taylor formulated, drafted and negotiated the terms and conditions of Vencap's preference shares in New York (IIT Br. p. 21). However, the record is clear that this resolution was first approved in the Bahamas at an extraordinary general meeting of shareholders of Vencap, prior to Taylor's involvement with the matter (A 504a); that Mr. Waddell of Carson Lawson attended and acted as secretary of the shareholders' meeting which approved the resolution (A 509a, 1590a, 1595a-96a, 1602a-04a); that Taylor was not the principal draftsman of the resolution (A 661a); and that the *entire* IIT/Vencap agreement, as well as the provisions relating to the preference shares, was negotiated, determined and ar-

ranged in the Bahamas (A 501a, 504a-09a, 599a-600a, 687a-88a, 1826a).

Notwithstanding plaintiffs' efforts to miscast the facts with respect to the negotiation and preparation of the IIT/Vencap agreement, the record leaves no doubt that the sole New York contact with respect to the IIT/Vencap agreement was the mere exchange of drafts of that agreement between Havens Wandless, and IIT's attorneys, Willkie, Farr & Gallagher ("Willkie Farr") (Main Br. p. 14). Indeed, plaintiffs' one reference to the record in support of their assertion that the terms and conditions of the Vencap preference shares were drafted in New York, refers only to the aforementioned exchange of drafts (A 1826a). Moreover, in complete contradiction to the position plaintiffs now assert, the district court found *only* that the IIT/Vencap agreement was prepared by Willkie Farr and presented to Pistell's lawyers for review (A 954a, 1605a-09a).

Plaintiffs' implication, at page 22 of their brief, that Murphy prepared the three-page memorandum to which the district court referred repeatedly in its opinion, and their claim that Havens Wandless sent that memorandum to defendant Graze, are both completely without merit and have already been laid to rest in Taylor, Murphy and Havens Wandless' main brief (Main Br. p. 13 text and footnotes). The testimony to which plaintiffs refer on this point requires careful reading because Murphy had before him in the hearing below a copy of the three-page memorandum, which was handed to him by plaintiffs' counsel, and he was testifying as to that document as well as to an earlier memorandum which he apparently prepared. With respect to the three-page memorandum, it was clarified that Murphy did not prepare that document; and that it was in fact prepared and typed, in the Bahamas, at the

offices of Carson Lawson (A 667a-68a, 674a-75a, 680a). With respect to the earlier memorandum, Murphy testified that he believed he had prepared a succinct statement of the purposes and objectives of Vencap and that it was furnished to the attorneys negotiating the IIT/Vencap agreement (A 667a-68a, 674a-75a).^{*} Although this point surely bears no further comment, it is significant that the district court found only that the memorandum had been prepared at Pistell's instructions without indicating by whom, or exactly where, the three-page memorandum had been drafted (A 953a-54a).

In a further effort to construct a jurisdictional base, plaintiffs also attempt to connect IIT's sale of a portion of its portfolio of United States securities to its investment in Vencap, and maintain that a part of the proceeds of that sale was used to purchase the Vencap preference shares (IIT Br. p. 24). This attempt is predicated upon the fact that after defendant Graze, who acted as IIT's portfolio manager, told Pistell that he intended to advise the funds he managed to obtain a more liquid position in the event the Dow Jones average dropped below 1040, Pistell suggested that if he were in Graze's position he would recommend investment in Japanese yen, Deutschmarks and gold because he predicted that there would be further currency devaluations and a resulting increase in the world price for gold. The record does not contain even a scintilla of evidence which might lead to an inference that Pistell's suggestion, or IIT's subsequent sale of \$121,703,019 in United States securities, were in any way related to an effort by either Graze or Pistell to raise

^{*} As further evidence that the three-page memorandum was not prepared by Murphy, it was addressed to International Capital Investments (Sterling) Limited ("International Capital"), rather than IIT, and Murphy had never heard of International Capital (A 75a, 681a).

money for IIT to invest in Vencap. Indeed, the only witness plaintiffs called to prove that the funds used to purchase the Vencap shares were a part of the proceeds of the sale of IIT's United States securities, admitted, on cross-examination, that he had no knowledge that such was the case; and plaintiffs made no subsequent effort to fill this gap in their evidence (A 467a-68a; see Main Br. p. 29).

Moreover, plaintiffs' leap from the fact that IIT sold its United States securities to their assumption that those securities were sold to enable IIT to invest in Vencap defies not only the record, but business reality as well. Surely one does not sell \$121,703,019 in securities for the purpose of raising funds for a \$3 million investment; and as even the most unsophisticated businessman will attest, a corporation with assets valued in hundreds of millions of dollars does not have to sell *anything* to make a \$3 million investment. In fact, there is support in the record for the conclusion that the funds for IIT's investment came directly from cash balances maintained by IIT in Luxembourg;* and the district court did not find that Pistell induced IIT to either sell securities or to use the funds generated from those sales to invest in Vencap (A 952a-54a).**

* Plaintiffs maintain not only that the \$3,000,000 IIT investment in Vencap came from the funds derived from the sale of IIT's United States securities, but that those funds were transferred to Vencap via the American National Bank & Trust Company of New Jersey. This point has been adequately set to rest by the citations to the record in Murphy, Taylor and Havens Wandless' main brief at page 15 and those references will not be repeated here.

** Plaintiffs also state that following the IIT investment in Vencap, Vencap invested a "substantial part" of the \$3,000,000 it received from IIT in United States securities. While the word "substantial" of course implies a subjective rather than an objective view of the facts, the substantiality of any Vencap investment in United States securities is of little importance, since

In sum, plaintiffs' numerous misstatements of fact include *inter alia*: the assertion that IIT has United States fundholders; a baseless assumption concerning the source of the IIT funds used to purchase the Vencap preference shares; and various incorrect statements with respect to the formation of Vencap, the formulation of the terms and conditions of the Vencap preference shares, the identity of the draftsmen of principal documents involved in the action and the geographic location at which such documents were negotiated and prepared.

POINT I

The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Federal Securities Law Claims.

Plaintiffs' subject matter jurisdiction argument is grounded, in virtually its entirety, upon a dual misreading of *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *rev'd in part on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969) and *Leasco Data Processing Equipment Corporation v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), which plaintiffs concede are the controlling cases in this Circuit with respect to the extraterritorial application of the antifraud provisions of the Federal securities laws. Plaintiffs maintain that under *Schoenbaum* and *Leasco* any effect upon the United States securities markets, however slight, remote or insubstantial that effect may be, or any conduct in the United States, regardless of its nature, is sufficient to permit the extraterritorial application of the Federal securities laws. However, even a cursory review of

any such Vencap investment, as will be fully demonstrated in the ensuing portions of this brief, is jurisdictionally irrelevant. See pp. 13-14 *infra*.

those cases reveals that *Schoenbaum* and *Leasco* hold that the United States securities laws may be applied to foreign transactions in foreign securities *only* when such application is essential to effectuate the purposes and objectives of the United States securities laws, i.e., the regulation of American securities exchanges and the protection of American investors. Thus, it is not, as plaintiffs maintain, any nexus with the United States, however slight or insubstantial, that is sufficient to establish a predicate for subject matter jurisdiction; rather, the nexus relied upon must be such as to justify the application of the securities laws in view of the statutory objectives which those laws seek to obtain.

In *Schoenbaum*, in which the allegedly improper foreign transactions involved foreign securities registered on an American securities exchange, the Court held that as the transactions in question had a detrimental effect on the equity value of foreign securities traded in the United States, there was an adequate basis for subject matter jurisdiction. It was this significant and substantial impact on an American securities exchange and American investors which served as the basis of the Court's decision in *Schoenbaum*. In *Leasco*, the Court held that misrepresentations made to American investors in the United States justified the application of the American securities laws to foreign transactions in foreign securities. *Leasco* did not hold, as plaintiffs seem to maintain, that any conduct in the United States, regardless of its nature, is a sufficient predicate for subject matter jurisdiction.

In the case at bar, there is not even a colorable claim that any misrepresentations were made to American investors; and the record is therefore completely bereft of support for any assertion that misrepresentations were made to American investors in the United States. Nor are

the securities in question traded on American markets. Thus, it clearly follows that the factual assertions relied upon by plaintiffs are totally insufficient to establish a basis for subject matter jurisdiction. Moreover, as Taylor, Murphy and Havens Wandless' main brief has already demonstrated and as will be further demonstrated below, virtually all of the "facts" upon which plaintiffs seek to base their claim of subject matter jurisdiction are totally unsupported by the record.*

Plaintiffs' contention that IIT's sale of its United States securities somehow provides jurisdiction over this action is totally without merit. The record lends no support to plaintiffs' underlying assumptions that the sale of those shares was triggered by IIT's decision to invest in Vencap, and that the proceeds of that sale were used to purchase the Vencap shares (see Main Br. pp. 29-30). However, quite apart from plaintiffs' factual inaccuracies, it is clear that IIT's sale of its United States securities cannot support jurisdiction over this action under either *Leasco* or *Schoenbaum*.

Surely, such sales do not provide "*Leasco* jurisdiction", as even plaintiffs do not contend that material misrepresentations were made to American investors in the United States in connection with the sale of IIT's United States securities. Nor do those sales provide the type of impact upon the American securities market which this Court found significant in *Schoenbaum*. The decisive element in *Schoenbaum*, the fact that the equity of the defrauded

* In furtherance of their effort to confuse the facts, plaintiffs have included in their argument long quotations from other cases in which Vesco is a defendant (IIT Br. pp. 38-39 and 43-44). With respect to those quotations, Taylor, Murphy and Havens Wandless will only restate the obvious—the facts of those cases are not the facts of this case; and as a result of that factual disparity those cases are completely inapposite to the issues at bar.

foreign corporation was reduced as a result of allegedly improper transactions in that corporation's securities and

that "this reduction in equity would be reflected in lower prices bid for the shares on the *domestic stock market*" (emphasis added [in the original])—is precisely what [the plaintiff] cannot show. As already noted, its shares are not sold in the domestic securities market, and the domestic injury found in *Schoenbaum* does not exist here. *Investment Properties International, Ltd. v. I.O.S., Ltd.*, [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,011, at 90,738 (S.D.N.Y.), *aff'd without opinion*, (unreported 2d Cir. 1971).

In short, as IIT's shares are not sold on United States securities markets, its activities cannot have a *Schoenbaum* type impact on those securities markets; and therefore its sale of United States securities, the price of which was totally unrelated to IIT's investment in Vencap, is clearly not a sufficient predicate for jurisdiction under *Schoenbaum*.*

Plaintiffs also argue that Vencap's investment in United States securities, which was made *subsequent* to IIT's purchase of the Vencap preferred shares, is of jurisdictional significance. However, plaintiffs fail to point to any misrepresentation made in the United States, to either plaintiffs or anyone else, with respect to those Vencap purchases; nor have plaintiffs shown any relationship at all between IIT's purchase of Vencap's preference shares and Vencap's subsequent investment in United States securities. Thus, Vencap's purchases of United States securities surely cannot result in a finding of jurisdiction under the *Leasco* rule.

* Indeed, plaintiffs did not even attempt to prove that the prices of the United States securities sold by IIT were in any way affected by the transactions involved herein.

Moreover, the lack of relationship between IIT's investment in Vencap and Vencap's subsequent purchase of United States securities, is also fatal to plaintiffs' argument that such Vencap purchases had the type of effect on the domestic securities market which would bring this action within the *Schoenbaum* rule.

In *Schoenbaum v. Firstbrook* "the value of American investments" was "impair[ed]" by consequences flowing directly from the securities fraud itself, not by subsequent and essentially unrelated deals. *Investment Properties International, Ltd. v. I.O.S., Ltd.*, *supra* at 90,737.*

In addition to their arguments with respect to IIT's unrelated sale and Vencap's unrelated purchase of United States securities, plaintiffs also set forth lists of various other "factual" bases for jurisdiction over this action. However, plaintiffs make virtually no effort to tie such "facts" to the record, nor do they demonstrate how such alleged facts are applicable to the principles of jurisdiction set forth in *Leasco* and *Schoenbaum* (IIT Br. pp. 40-42). Furthermore, plaintiff could not make such a showing, as none of those "facts" are qualitatively sufficient to provide the nexus which *Schoenbaum* and *Leasco* require.

Included in these "factual" lists are plaintiffs' arguments with respect to the citizenship of certain defendants, their claim that various defendants maintain offices in New York, allegations concerning the role of the bank which acted as a securities custodian for IIT, and allegations concerning the preparation of several documents relevant

* If United States activity unrelated to the transactions sued upon were jurisdictionally relevant, the extraterritorial reach of the Federal securities laws would be virtually unlimited. See Main Br. at pp. 23-25.

to this action. As all of these "facts" have already been dealt with in either this brief or Taylor, Murphy and Havens Wandless' main brief, they require no further comment here.

However, several statements contained in plaintiffs' lists of allegedly jurisdictionally relevant facts merit at least passing comment. Thus, plaintiffs claim, with no reference to the record, that Pistell participated in meetings in the United States with other defendants, including Taylor and Havens Wandless. Yet plaintiffs fail to indicate when such meetings allegedly took place, or whether such meetings had any relationship to the transaction involved herein (IIT Br. p. 40). Similarly, the record does not support plaintiffs' claim that approximately twenty-five percent of the proceeds of IIT's investment in Vencap were "misappropriated" by Pistell using checks issued by Taylor and Pistell in New York (IIT Br. p. 41). Indeed, plaintiffs do not even attempt to set forth any facts to support that bald conclusion. Clearly, the aforementioned portions of plaintiffs' lists are so general, conclusory and unsubstantiated as to render them completely meaningless.

Plaintiffs cap their list of "jurisdictional facts" with a statement that is not only conclusory and unsupported by the record, but which assumes knowledge of the state of mind of every investor in the world. Thus, plaintiffs state:

A notorious stock fraud designed and engineered by United States citizens (Vesco and others) had the inexorable effect of damaging investors' confidence in the United States securities market and thus had an effect on the United States securities markets (IIT Br. p. 42).

Irrespective of the fact that such effect upon the American securities market, even if it could be proven, would

not come within the purview of the *Schoenbaum* test, the above-quoted statement simply falls of its own weight.

Finally, plaintiffs argue, for the first time on this appeal, that Vencap should be deemed "legally and factually a resident of the United States" on the basis of several SEC rules* that limit the exemptions to Sections 12, 14 and 16 of the Securities Exchange Act of 1934 (the "Exchange Act") which are generally available to foreign corporations. While the basis of plaintiffs' argument with respect to these rules is not completely clear, plaintiffs apparently contend that transactions in the securities of a corporation subject to Sections 12, 14 and 16 of the Exchange Act are necessarily subject to the provisions of the Federal securities laws upon which plaintiffs base their claims. Whatever the merits of this argument as a general rule, it is simply inapposite to the case at bar, as the very language of Sections 12, 14 and 16 makes those provisions inapplicable to Vencap; and thus renders the issue of whether or not Vencap is entitled to an exemption from those Sections on the basis of the aforementioned SEC rules irrelevant.**

* Securities Exchange Act Rule 3a12-3(b), 17 C.F.R. §240.3a12-3(b) (1972) and Securities Exchange Act Rule 12g3-2(e), 17 C.F.R. §240.12g3-2(e) (1972).

** Registration pursuant to Section 12 of the Exchange Act is mandatory pursuant to paragraph (g) thereof, only for corporations which have one million dollars or more in assets and a class of equity securities held by five hundred or more persons. As Vencap has only three equity shareholders—Pistell, Blackman and IIT—and five qualifying shareholders, it is simply not required to register any class of its equity securities under Section 12, even if it does not fall within any of the exemptions contained in the rules promulgated by the SEC pursuant to that Section. (A 1194a-95a). Neither are Sections 14 and 16 of the Exchange Act applicable to Vencap, as the applicability of those Sections is dependent upon the applicability of Section 12.

Even if Vencap were subject to the provisions of Sections 12, 14 and 16 of the Exchange Act, a review of the aforementioned SEC rules indicates that it would be entitled to an exemption. Those rules provide that certain of the exemptions to Sections 12, 14 and 16 generally enjoyed by foreign corporations are not applicable to a foreign corporation if: (1) more than fifty percent of its outstanding voting securities are held directly or indirectly by residents of the United States and (2) the corporation's business is administered principally in the United States or one-half or more of its board of directors are residents of the United States. When the facts are measured against the above-mentioned rules, Vencap's foreign status is overwhelmingly apparent: United States residents do not own any Vencap securities; Vencap's business is administered principally outside the United States; and more than one-half of Vencap's board of directors are non-residents of the United States. (A 1194a-96a).*

Thus, when plaintiffs' factual inaccuracies are corrected, and plaintiffs' legal inaccuracies are brought to light, there is no doubt that subject matter jurisdiction over this action, pursuant to the Federal securities laws, is lacking.

* Except for certain qualifying shares, all of which are owned by Bahamians, Vencap's voting securities are owned equally by Pistell, a resident of the Bahamas, and Blackman, who is a citizen and resident of the Bahamas. Vencap's corporate records also clearly indicate that at all times relevant herein all or a majority of the Vencap board of directors were residents of the Bahamas (A 1194a-96a).

POINT II

The Non-Securities Law Bases Upon Which Plaintiffs Assert Subject Matter Jurisdiction Are Also Insufficient to Confer Jurisdiction Over This Action.

Plaintiffs also contend that jurisdiction over this action exists pursuant to the principles of pendent jurisdiction, Section 302 of the New York Civil Practice Law and Rules (the "CPLR") and Section 1350 of the Judicial Code, 28 U.S.C. §1350. Plaintiffs' pendent jurisdiction and CPLR 302 arguments have already been fully dealt with in Murphy, Taylor and Havens Wandless' main brief at pages 35-36. With respect to pendent jurisdiction, it is sufficient to note that as plaintiffs have shown no basis for jurisdiction over their Federal claims, there is no basis for pendent jurisdiction. As to plaintiffs' CPLR arguments, it need only be repeated that CPLR 302 is relevant only to the question of personal jurisdiction, which is not in issue on this appeal.*

Plaintiffs base their final jurisdictional argument on the theory that defendants have committed a tort in violation of the law of nations and that therefore jurisdiction may be predicated upon Section 1350 of the Judicial Code. That Section provides Federal jurisdiction over an action by an

* It is worthy of note that plaintiffs have failed to urge, as they did in the district court, that subject matter jurisdiction over this action may be grounded upon 28 U.S.C. Section 1337 (a civil action arising under an Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies) and 28 U.S.C. Section 1332 (diversity jurisdiction). Thus, plaintiffs apparently concede that neither Section 1337, nor Section 1332, is a proper basis for the exercise of jurisdiction over this action, and that the district court was in error in finding that it had jurisdiction pursuant to Section 1337 and probable jurisdiction pursuant to Section 1332 (see Main Br. pp. 32-34).

alien for a tort committed in violation of the law of nations or a treaty of the United States.

Despite plaintiffs' contentions, a review of the applicable authorities leaves no doubt that a violation of the law of nations arises only when an individual violates the rules of conduct which sovereign nations use in dealings *inter se*, and thereby impinges upon the sovereignty of an independent nation. *Valanga v. Metropolitan Life Insurance Co.*, 259 F. Supp. 324, 328 (E.D. Pa. 1966); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963). Thus, the law of nations is violated by

... the unlawful seizure of a vessel and its disposition as a prize, the seizure of neutral property upon the ship of a belligerent, unjustified seizure of an alien's property in a foreign country by a United States officer, failure to accord comity to ships of foreign countries, and concealment of a child's true nationality coupled with the wrongful inclusion of that child on another's passport. *Lopes v. Reederei Richard Schroder*, *supra* at 296.

As the instant record does not disclose a single act which could even inferentially compromise the sovereignty of any nation, defendants clearly have not committed a violation of the law of nations.

Plaintiffs attempt to overcome this insurmountable obstacle to the exercise of jurisdiction pursuant to Section 1350 by arguing that

... [t]hiev-ery is a crime in every civilized nation. A fraud (a tort) when it reaches the proportions of a \$3 million "investment" in a sham company and gross misappropriations is nothing more than blatant thiev-ery (IIT Br. p. 55).

However, the argument that "fraud is considered immoral and unlawful by all nations and thus is a violation of the law of nations" has been squarely rejected for the very reasons set forth above—the rules of conduct through which sovereign nations control their dealings *inter se* are simply not involved in a fraud action. *Abiodun v. Martin Oil Service, Inc.*, 475 F.2d 142, 145 (7th Cir.), *cert. denied*, 414 U.S. 866 (1973). Moreover, even if plaintiffs were correct in their argument that thievery is in violation of the law of nations, thievery is simply not in issue on this appeal. Indeed, plaintiffs' attempt to imply the presence of such conduct is indicative of the extreme lengths to which they have gone in a desperate effort to sustain subject matter jurisdiction over this action.

Thus, plaintiffs' Section 1350 argument is completely without merit and should be rejected in all respects.

CONCLUSION

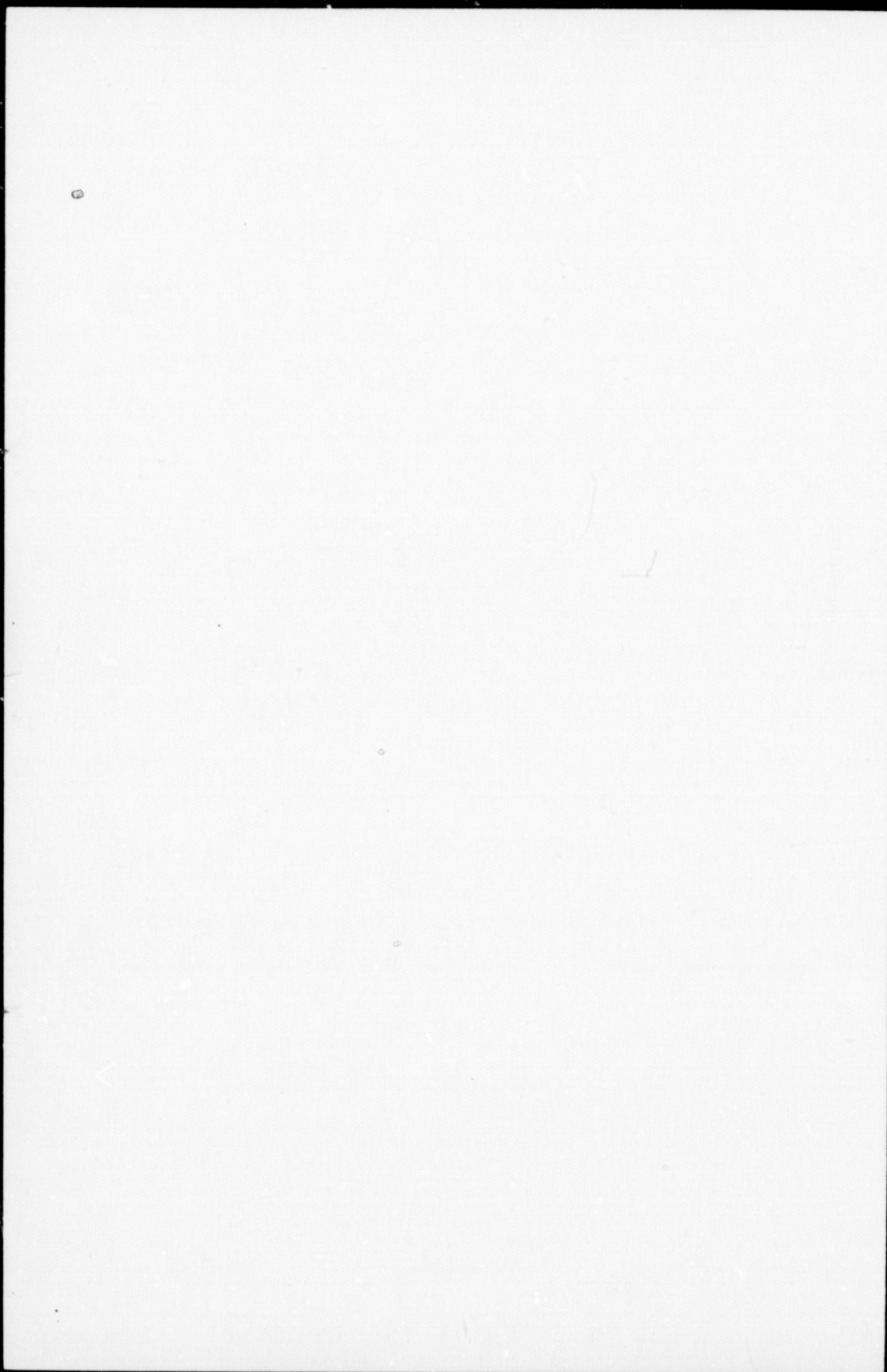
For the reasons set forth herein and in Murphy, Taylor and Havens Wandless' main brief, the decision of the district court should be reversed, and this Court should enter an order directing the district court to dismiss the complaint herein for lack of subject matter jurisdiction.

Respectfully submitted,

CURTIS, MALLET-PREVOST, COLT & MOSLE
*Attorneys for Defendants-Appellants-
 Cross-Appellees*
 Charles E. Murphy, Jr.,
 David Taylor and
 Havens, Wandless, Stitt & Tighe
 100 Wall Street
 New York, New York 10005
 Telephone (212) 248-8111

Of Counsel:

PETER K. LEISURE
 JOHN E. SPRIZZO
 ROBERT S. LIPTON
 JOHN F. EGAN



Service of 2 copies of this within

Reply Brief is admitted this

27 day of February 1975

Arthur M. Munisteri, Esq.
ATTORNEY FOR Plaintiffs - Appellees
Gross Appellants

Arthur M. Munisteri, Esq.

By E. F. Ans 2/27/75

Attorneys for Defendant - Appellant - Cross Appellee -
Richard C. Pistell

② Copies received 3:40
2/27/75

Gerald E. Paley for Paley & Miller

Attorneys for Defendants - Appellants - Cross Appellees

Venacap Limited, Intercapital N.V. and Intenent, Inc.

RECEIVED

FEB 27 1975